DATE: October 5, 2021
TO: Agricultural Labor Relations Board
FROM: John J. McCarrick, Administrative Law Judge and
Mary Miller Cracraft, Administrative Law Judge
RE: Regulatory Proposals – Unfair Labor Practices

COMMENTS ON AGRICULTURAL LABOR RELATIONS BOARD'S PROPOSED REGULATIONS

On September 22, 2021, the Agricultural Labor Relations Board, herein Board, proposed new and amended regulations to 8 C.R.R. 20100 et. seq. Pursuant to the Board's invitation, comments to these proposals are submitted on behalf of Administrative Law Judges John J. McCarrick and Mary Miller Cracraft. Thank you for your consideration of these comments.

§20220(c) – Establishment of Laches Defense

Among the regulatory changes the Board is considering is an amendment to regulation section 20220(c). The proposed amendment provides:

> (c) If the general counsel has not issued a complaint pursuant to subdivision (a) of this section within 12 months of the date an unfair labor practice charge was filed, the charge shall be deemed dismissed. Where an amended charge has been filed, the 12-month time period in which to issue a complaint shall run from the date the original charge was filed. The general counsel may apply to the Board for an extension of time to conduct further investigation of a charge for good cause shown based upon a claim that the charged party's conduct impeded the general counsel's timely investigation of the charge or other extraordinary circumstances. The length of an extension based upon a charged party's dilatory conduct may be commensurate with any delays reasonably incurred as a result of such conduct. The length of an extension based on other extraordinary circumstances shall be limited to a single extension of no more than 60 days.

It is our opinion that this proposed change to Board regulation section 20220 would do irreparable harm to the purposes and policies of the Agricultural Labor Relations Act, herein Act.

The proposed amendment to section 20220 creates the legal defense of laches to an unfair labor practice complaint where none has heretofore existed. Both the Board and the National Labor Relations Board, herein NLRB, as well as the courts have uniformly held that there is no defense of laches in an administrative proceeding. The reason is clear. As the United States Supreme Court held in *NLRB v. J.H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, 264-265:

> This court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers. *NLRB v. Electric Cleaner Co.,* 315 U.S. 698 (1942); *Labor Board v. Katz*, 369 U.S. 736, 748 n. 16 (1962).

The NLRB in *Newark Electric Corp.,* 366 NLRB No. 145 (2018) slip op. at 1, fn. 2 has likewise held that laches is an inappropriate defense in the vindication of public rights:

> We reject the Respondents' defense of laches, which does not bar action by the Board, as a federal government agency, to vindicate public rights. See *Energy Mississippi, Inc.,* 361 NLRB 892, 893 fn. 5, enfd. in relevant part 810 F.3d 287 (5th Cir. 2015); (2014); *F.M. Transport, Inc.,* 302 NLRB 241 (1991).

The Board has consistently held that laches is not available as a defense in an unfair labor practice case. In *Mission Packing Company*, 8 ALRB No. 47 (1982) slip op. p. 2, the Board noted that, "The NLRB has consistently held that laches is not a defense in its proceedings and that administrative delay is not sufficient reason to deprive employees of their statutory rights." (Citations omitted). The Board reaffirmed this position in *Ace Tomato Company, Inc.,* 41 ALRB No. 5 (2015) slip op. at p. 32, that inordinate agency delay should not be inflicted upon wronged employees, citing the rationale in *NLRB v. Rutter-Rex Manufacturing Co., supra,* and *NLRB v. Int'l Ass'n, Bridge, Structural & Ornamental Ironworkers, Local 490* (1984) 466 U.S. 720, 724.

Labor Code Section 1140.2 provides the rationale for the creation of the ALRB. This section states in pertinent part:

> 1140.2 It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to the full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restrain, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .

Proposed Board regulation 20220(c) would in effect create a laches defense contrary to the long Court and Board history of precluding this defense because to do so, in effect, lays the blame for inordinate agency delay upon employees whose rights under the Act have been violated. The creation of this defense violates the spirit and policy behind the Act by requiring general counsel to vindicate farmworkers' rights during an arbitrary 12-month period. Creating any time period for the agency to issue a complaint unreasonably places the balance in favor of wrongdoing employers and against wronged employees. Clearly such a regulation violates the purpose and policy of the Act.

Moreover, it is unclear whether proposed regulation 20220(c) would confuse extant authority regarding relation back of an amended charge to a timely filed charge. See, e.g., *Rogers Foods, Inc.* (1982) 8 ALRB No. 19 (ALJD at p. 6); *Applebee's* (2006) 346 NLRB No. 44, slip op. at 3, citing *WGE Federal Credit Union* (2006) 346 NLRB 982, 983. Finally, other measures for guaranteeing timely processing of unfair labor practice charges exist. Oversight and time targets have proven effective at the NLRB and could easily be implemented here rather than the Draconian policy of adopting a laches defense.

§20247.1 Case Management Conference

A new regulation is proposed which sets out the appropriate matters to be discussed at a Case Management Conference (CMC). Such a rule has never been included in the regulations and is long overdue. Subpart (a) of the proposed regulation sets a time requirement for a CMC (10 days after the answer is filed) and enumerates seven items for discussion at the CMC. It is submitted that some of the seven items

listed for discussion at the CMC may be more fully and meaningfully addressed in the Pre-Hearing Conference (PHC). It is further submitted that holding a CMC 10 days following the filing of the answer is too early to provide informed data.

Each of the seven items enumerated in subpart (a) are worthy of consideration at the CMC. However, due to the early timing of the CMC, the information elicted should be understood as reflecting only a rough estimation. Further topic by topic explication follows. The seven topics in proposed §20247.1(a) are:

1. The expected length of the hearing should definitely be explored in the CMC but should be understood as only a rough estimate at this point in time.
2. The size of the hearing room needed is also a valid CMC topic but size is a sliding scale depending on subsequent stipulations reached, amendments to the complaint, and the effect of the current pandemic, all of which are more predictable by the time of the PHC. Further, at the time of the CMC, hearing room contracts may not be warranted.
3. Interpreter necessity is sometimes unknown by all litigants until pretrial. The interpreter contracts may not be warranted until a later date.
4. "Whether the case is expected to present any novel or complex legal issues" is, of course, another relevant CMC querry. However, further issues may develop which overcome the answers provided at the CMC.
5. The appropriate timing for appointment of a settlement judge is a total unknown during the CMC time period. Moreover, settlement judge discussions have never been a requirement. The current practice is that the parties work to settle a case on their own and request a settlement judge only when they run into roadblocks. Typically, during the CMC, the parties have not yet assessed the viability of settlement discussions. Further discussion of this issue is below, in connection with the proposed amendment to §20248.
6. Of course, intention to conduct discovery should be included as a CMC topic.
7. Additional suggestions for expediting the hearing process are always welcome. The other wording in this item, "add value to the hearing process," is unclear.

Proposed 20247.1(b) adds wholly unnecessary elements of pre-CMC conferral and an ALJ CMC Order as follows:

> The parties shall meet and confer regarding the matters to be addressed at the [CMC] and shall file, jointly or separately, a [CMC] statement no later than 5 days before the scheduled date of the conference. The assigned administrative law judge [ALJ] may take the CMC off calendar if the [ALJ] finds the parties' [CMC] statement or statements sufficiently address the matters to be addressed at the conference. The [ALJ] shall issue an order summarizing the results of the [CMC] as soon as practicable after the conference is held or, if taken off calendar, was scheduled to be held.

The CMC has long been an informal conference between litigants and the ALJ. Requiring a formality that the parties file CMC statements 5 days post-answer is unnecessary. Requiring a further formality, a post-CMC ALJ order, is totally unnecessary. As a matter of course, the ALJs inform the Executive Secretary's Office (typically by internal email) of matters discussed at the CMC. It is submitted that requiring CMC statements and orders are pure "make work" and do not meaningfully move the parties toward focusing on litigation.

§20248 Settlement Conference

Settlement is perhaps the optimal outcome of litigation. Once a case is settled, the parties are able to continue their work without interruption. Further, the Board can focus administrative resources to further projects. The proposal to amend §20248 appears to mandate appointment of a settlement judge in each case. Current practice allows the appointment of a settlement judge at any time, as an option whenever the parties reach roadblocks in their own settlement discussions. In other words, the current practice is that a settlement judge is discretionary and appointed based on the needs of the parties. Typically, either the parties or the assigned trial judge assess the situation and only request an independent settlement judge when efficacious. The proposed change in the rule is laudable only if the parties are ready and willing to accede to the mandatory timeline and framework. At first glance, the mandatory timeline and framework appear unnecessary.

Judge McCarrick has served as an administrative law judge for the Board for over three years. Prior to his service with the Board, he was an administrative law judge for the National Labor Relations Board, herein NLRB, for 15 years, an administrative law judge with the Social Security Administration for eight years, an Immigration Judge for nine years and a trial attorney with the NLRB for ten years. Judge Cracraft has served as an administrative law judge for the Board for over four years. Prior to that time, she was an administrative law judge with the NLRB for 22 years, a member of the NLRB for 5 years, an assistant executive secretary to the NLRB for 2 years, and practiced labor litigation for eight years (four with the NLRB and four in private practice).